

NOV 15 2005**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS****NOT FOR PUBLICATION****UNITED STATES COURT OF APPEALS****FOR THE NINTH CIRCUIT****UNITED STATES OF AMERICA,****Plaintiff - Appellee,****v.****FRED JAMES LEMAY, III,****Defendant - Appellant.****No. 05-35111****D.C. Nos. CV-04-110-DWM
CR-99-116-DWM****MEMORANDUM^{*}**

**Appeal from the United States District Court
for the District of Montana
Donald W. Molloy, District Judge, Presiding**

Submitted November 8, 2005^{}**

Before: WALLACE, LEAVY, and BERZON, Circuit Judges

Fred LeMay, a federal prisoner, appeals the denial of his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence for aggravated sexual assault of a minor, in violation of 18 U.S.C. §§ 1153 and 2241(c). He contends that under

^{*} This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

^{**} This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

United States v. Booker, 125 S. Ct. 738 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004), the district court violated his Sixth Amendment rights in enhancing his sentence based on judge-found facts. This contention is foreclosed because *Booker* does not apply retroactively to convictions that became final prior to its publication. See *United States v. Cruz*, 423 F.3d 1119, 1119-20 (9th Cir. 2005) (per curiam).

AFFIRMED.